UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 18-23538-rdd

Adv. Case No. 20-06982-rdd

- x

In the Matter of:

SEARS HOLDINGS CORPORATION,

Debtor.

- x

KMART HOLDING CORPORATION et al.,

Plaintiffs,

v.

WINIADAEWOO ELECTRONICS AMERICA INC.,

Defendant.

- x

United States Bankruptcy Court

300 Quarropas Street, Room 248

White Plains, NY 10601

July 27, 2021

10:30 AM

B E F O R E :

HON ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

ECRO: JUSTIN WALKER

HEARING re Debtors' Update on Progress Toward Effective Date

HEARING re Adversary proceeding: 20-06982-rdd Kmart Holding Corporation et al v. Winiadaewoo Electronics America Inc. Motion to Compel Document Production and Interrogatory Responses filed by Perry R Clark on behalf ofWiniadaewoo Electronics America Inc. (ECF #13)
Affidavit: Declaration of Perry Clark in Support of Motion to Compel (related document(s) 13) Filed by Perry R Clark on behalf of Winiadaewoo Electronics America Inc .. (Attachments: # 1 Exhibit Debtors Kmart's Interrogatory Responses# 2 Exhibit Debtor Sears Interrogatory Responses# 3 Exhibit Debtor Kmart's Responses to Document Requests# 4 Exhibit Debtor Sears' Responses to Document Requests# 5 Exhibit Privilege Log# 6 Exhibit Letter from Debtors' Counsel to Court)(Clark, Perry) (ECF #14)

HEARING re Adversary proceeding: 20-06982-rdd Kmart Holding Corporation et al v. Winiadaewoo Electronics America Inc. Plaintiffs' Objection to Winiadaewoo Electronics America, Inc.'s Motion to Compel (related document(s) 13) filed by Steven J. Reisman on behalf of Kmart Holding Corporation, Sears, Roebuck and Co. (ECF # 16)

HEARING re Adversary proceeding: 20-06982-rdd Kmart Holding Corporation et al v. Winiadaewoo Electronics America Inc. Reply In Support of Motion to Compel Document Production and Interrogatory Responses (related document(s) 13) filed by Perry R Clark on behalf of Winiadaewoo Electronics America Inc .. (Clark, Perry) (ECF # 17)

HEARING re Adversary proceeding: 20-06982-rdd Kmart Holding Corporation et al v. Winiadaewoo Electronics America Inc. Letter re Discovery Dispute Filed by Perry R Clark on behalf of Winiadaewoo Electronics America Inc. (ECF # 18)

HEARING re Adversary proceeding: 20-06982-rdd Kmart Holding Corporation et al v. Winiadaewoo Electronics America Inc. Letter in Response to Defendant's letter dated May 21, 2021 (related document(s)l8) Filed by Steven J. Reisman on behalf of Kmart Holding Corporation, Sears, Roebuck and Co. (ECF #20)

HEARING re Motion to Compel /Motion to Enforce Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief (ECF #9647)

HEARING re Declaration of Kimberly Black in Support of Defendant's Motion to Enforce Order
(related to #9647) (ECF #9648)

HEARING re Certificate of No Objection Pursuant to LR 9075-2 Regarding Order Enforcing the Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyers, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief (related document(s)9647, 9648) Filed by Luke A Barefoot on behalf of Transform SR Brands LLC. (ECF #9673)

HEARING re Notice of Hearing on Objection and Motion for Extension of Time to File an Appeal filed by James Edmond Smith (ECF #9641)

HEARING re Debtors' Objection to Motion to Extend Time to Appeal (related document(s)9641) filed by Garrett A. Fail on behalf of Sears Holdings Corporation. (ECF #9664)

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: Okay, good morning. This is Judge Drain. We're here In re Sears Holdings Corporation, et al. I have the amended agenda for today's omnibus hearing and I'm happy to go down that agenda in order as it's stated.

So I think the first matter on the agenda is the status conference, including the Debtors' update on progress toward the effective date for the confirmed Chapter 11 plan. Related to that filed this morning was a written status update by the Debtors dated today, which I've had a brief opportunity to review.

MR. FAIL: Thank you, Your Honor. You cut out at least on my end and I apologize. This is Garrett Fail from Weil Gotshal. Are you able to hear me?

THE COURT: Yes.

MR. FAIL: Excellent. Are you able to see me?

THE COURT: Yes.

MR. FAIL: Thank you. As one matter of housekeeping before jump into the status conference, which is listed as item number one on the agenda, which we filed at Docket 9677.

If I could turn the podium over to Mr. Barefoot from Cleary, there's one item that I think we can take off the agenda for today.

THE COURT: Okay.

MR. FAIL: It might be efficient. Thank you, Judge.

MR. BAREFOOT: Thank you, Mr. Fail. Good morning, Your Honor.

THE COURT: Good morning.

MR. BAREFOOT: Your Honor, Luke Barefoot from Cleary Gottlieb for Transform Holdco and its affiliates. I just briefly wanted to item number three on the agenda, which is Docket item 9647, Transform's motion to enforce the sale order.

THE COURT: Right.

MR. BAREFOOT: And with Your Honor's permission, I'd just like to propose a path forward on that item.

THE COURT: You can go ahead, Mr. Barefoot. I'm sorry. Who is speaking?

MR. SMITH: James Edmond Smith, and I saw that motion that they filed and they're asking for the budget that is requested on my request, which --

THE COURT: Mr. Smith, you're speaking on a different motion. The matter that Mr. Barefoot is addressing doesn't pertain to you. It pertains to a different matter.

You can go ahead, Mr. Barefoot.

MR. SMITH: Okay, I apologize. Just the amount they were asking for --

THE COURT: Mr. Smith, I will cut you off if you continue to interrupt. The matter that you are addressing that involves you is not the matter we're discussing now. It will come up as item five on the agenda. This is item three.

MR. SMITH: Thank you.

THE COURT: You can go ahead, Mr. Barefoot.

MR. BAREFOOT: I apologize, Your Honor. Pursuant to communications with Your Honor's chambers yesterday following the filing of our certificate of no objection, we are in the process of seeking confirmation that counsel for the plaintiff in the Illinois state court action that's at issue in the motion to enforce is authorized and was authorized to receive service of the motion on behalf of the plaintiff. And we sought that confirmation, but as of this morning, we do not yet have it.

So what I would suggest, subject to Your Honor's views, is that we adjourn the motion to the next omnibus hearing and pursue in parallel two options. First, Transform would continue to seek confirmation that plaintiff's counsel was authorized to receive service of the motion to enforce. And if we receive that, we would file evidence of that confirmation with an amended certificate of no objection.

Second, in the alternative, we would re-notice the

motion for the next omnibus hearing and file an affidavit of service reflecting service of the motion and the amended notice of hearing on plaintiff at their last known address individually.

THE COURT: Right, that's fine. That procedure is fine. As you noted, my concern was that the certificate of service showed just service on counsel in the state court action and counsel had not appeared in this case and it wasn't clear whether the counsel was generally authorized to receive service with respect to a motion like this, so that two track approach is fine.

MR. BAREFOOT: Understood, Your Honor.

THE COURT: And consistent with my normal practice, if there are no objections and I see that amended certificate of service or confirmation, then we don't need to have a hearing. You can submit the order with backup materials, and in all likelihood, it'll be entered.

MR. BAREFOOT: Thank you, Your Honor. We will do so.

THE COURT: Okay, very well.

MR. BAREFOOT: With Your Honor's permission, may I be excused from the remainder of the hearing?

THE COURT: Yes, sure, that's fine.

MR. BAREFOOT: Thank you, Your Honor.

MR. FAIL: Okay, Your Honor. Garrett Fail, Weil

Gotshal for the Debtors again.

What I'll propose to do is walk the Court and parties through a presentation that we filed on the docket at ECF No. 9680. It's an update from the last presentation that we made on April 27th in accordance with the confirmation order.

I'll start off with an update on the progress of administrative, priority, and secured claims reconciliation. To date, the Debtors have reconciled more than 4,443 opt-in and non-opt-out and opt-out administrative claims. That's up approximately 473 from our April report.

The Debtors have expunged or reclassified to a non-hundred cent claim approximately $2.5 billion of claims asserting entitlement to administrative, priority, or secured status, and we have objections pending to eliminate an additional $1.1 billion of secured claims. That's up from $1.3 million in our April report.

We've allowed to date approximately 1,788 administrative claims, up 120 from our last report.

We're disputing currently through objections 40 non-opt-out claims that assert approximately $6.3 million. This excludes allowed claims that we're holding distributions for where there are outstanding preference issues only. The 40 is down from our April report and these should be the total remaining population of opt-ins and non-

opt-out claims, Your Honor.

In terms of the opt-outs, the Debtors have reduced their estimate as a result of objections and further analysis. We've reduced our estimate of the ultimate allowed amount of those by an additional $7 million.

In terms of distributions, Your Honor will recall we've made two distributions to date on administrative claims pursuant to the administrative consent program following confirmation. As the Court is aware and I think all parties are, these are just a small fraction of administrative claims that arose and that were satisfied in the case.

Throughout the first year in the case and thereafter, I think, you know, rough estimate, you know, $1 -- $2 billion of claims have been paid and satisfied. And so, this is -- and what we've been talking about has been the remainder of what remains unsatisfied, but it's important to keep it in context of what's happened during these cases.

So far, post-confirmation, Judge, $43 million has been distributed. You'll notice an increase of about a million dollars as a result of catchup distributions made after claims had been allowed following the last distribution. We made an initial distribution in 2019 and a subsequent one in 2020.

The Debtors have announced and proposed a third interim distribution. They announced -- we announced that the amount will be an additional $10.5 million.

I hear some feedback. Can I ask parties to mute their lines if they're not speaking?

THE COURT: All right. You're coming through clearly here, Mr. Fail.

MR. FAIL: Okay. I appreciate it. Thank you, Judge.

So we're making another distribution of $10.5 million, you know, subject to today's hearing. That's an equivalent additional amount of 8.3 percent to outstanding creditors. It brings the total to those creditors of 37 percent recovery, which is approximately one-half of the amount that we may owe under the admin consent program. Your Honor will recall that parties are entitled to 75 or 80 percent of their claims.

The Debtors were able to make this announcement after working with their restructuring committee, but importantly, also with the representative for administrative claims, Mr. Polkowitz, who I see on the screen, and his counsel, Ms. Morabito, who I saw earlier on the screen as well. The Debtors have made the announcement and are making the distribution of available cash as it became available and as prescribed by the confirmation order when we reached

the certain minimum conditions. On page 3 of the deck, we provide further breakdown.

Before I get into that, Your Honor, we filed a notice of the distribution amounts that we propose to make listing each of the parties that would receive an opt-in distribution, a non-opt-out distribution, and the parties for whom we proposed holding back reserves for disputed claims. We filed that on July 2nd, roughly 25 days ago.

We encouraged any party who had a question or an issue to simply email the Debtors to resolve any questions. We thought that that would be the most efficient way. And we're happy to announce that it was largely successful, and we eliminated filings on the docket.

We filed a revised notice early this morning. It started out as yesterday afternoon and it went into early this morning. We made a number of changes and a number of corrections to address the responses that we received, including those that came in as late as midnight last night. But most notably, we increased everyone's distribution percentage from the 7.3 percent that we announced on July 2nd to 8.3 percent, and we announced that the total recovery would be increased from 36.1 to 37 percent in the notice that we filed yesterday.

So that is positive news and positive development, and we thank all the parties with whom we worked, especially

and including Mr. Polkowitz and his counsel, to get to where we got today. The chart on page --

THE COURT: When do the Debtors anticipate making that third distribution?

MR. FAIL: It's simply a matter of mechanics, Your Honor. We will, following today's hearing assuming nothing gets in the way, proceed to put the wheels in motion with Prime Clerk to get checks mailed out and wires lined up. We said that we would start on or about July 31. It's just simply a matter of mechanics at this point.

THE COURT: Okay.

MR. FAIL: So on page 3, a number of things to just walk through.

We show the number of claims that have been -- you know, that will receive a distribution, and we thought it important to break out the parties who have been satisfied in full. So of the 1511 claims that received distributions to date, 1,067 in the top cortile of the chart, or 70 percent of those parties that were administrative claims on the confirmation date have been satisfied in full. They received payments through the de minimis order that the Court allowed us to pay in full the amounts that we were required to.

That leaves roughly 444, only 444 remaining of allowed opt-ins and allowed opt-out creditors. The columns

on the chart show the asserted amounts, the net amounts as a result of setoff, the net amounts resulting from the discount of the program, the amount paid, and the amount remaining to be paid, including $8.6 million that we're proposing to send out to creditors now.

We then go on to detail the count of claims that have been reconciled but are being -- distributions for those claims are being held subject to resolution of preferences. There's roughly 111 claims. Money is being reserved for them in a pro rata distribution, so no party is prejudiced.

We show that there are roughly 40 disputed claims, and we show the Debtors' estimate of those claims, as well as the asserted amount.

Moving down to the opt-out of claims to be reconciled. We've made significant progress, as I detailed earlier, and we show the amount in number and dollars and the Debtors' estimate of those claims, so there's some work to be done there.

And then we show that there a number where we're expecting them to be withdrawn.

Moving down to the bottom of the chart, Judge. We show the work that needs to be done and the work that has been done importantly on the priority claims. We've made significant progress. We show the Debtors' estimate of

those amounts. We show that we have put on objections to over 400 claims that asserted secured status. We show the super-priority claims that have been asserted, and we show our estimate.

In total, the estimate of what remains to be paid is $102 million.

Your Honor may note that -- well, I'll go on to the next page and we can into detail, a little bit more detail.

The next page shows the estimate of additional funds that would be needed to satisfy all the claims that I just identified, all the 111 claims. We start with the cash balance of the Debtors' estimate they'll have at the end of the month. We take out the reserves that the Debtors are putting aside for future needs and claims reserves.

If the distribution is made at 10.5, we have just above the minimum thresholds that is required to be maintained, the 10.7.

We identify and itemize the remaining of the Debtors and the Debtors' estimates of future recoveries on those. The Debtors have outperformed their estimates since the last report. So, for example, for the real estate assets, sales were showing $1.6 million remaining. Our last report showed $1.3, and we're at -- you know, we've already had recoveries on this. So in total, we show that -- we

show here $26.1 million of estimated cash remaining.

We then carry forward some numbers from the previous page showing uses, and we show the $56.8 million of administrative expense claims that need to be paid; that's down from $70.8 million last report and our estimate of priority and secured net of reserves.

One thing to note here is the Debtors' estimate for tax claims. We've included and we'll have detail later on, we've included the full amount of tax claims here. Our previous reporting had the amount that would have been required on the effective date if we had stretched it out, but we thought for full disclosure and clarity, it would be better to put our full estimates in here. Net-net, we --

THE COURT: I'm sorry. I had a -- on the priority and secured, the estimate seems to be 5 million lower than the estimate on the earlier page, on the previous page?

MR. FAIL: It's net of reserves, Your Honor.

THE COURT: Okay.

MR. FAIL: So there's the reserves, so it tracks--

THE COURT: -- already for that.

MR. FAIL: Yup.

THE COURT: All right. And these -- I just want to confirm. When you refer to secured, these are not -- this is not funded debt; this is tax liens or other judicial liens or other types of things like that or just claim liens

by people who checked the box that their claim is secured?

MR. FAIL: In terms of what's been asserted, it's across the board in terms of what we think net liability is, Judge. There's an overlap between the relators, for example, secured claim that also has a super-priority status to the extent that it becomes allowed, so there's an overlap and it's not all separate. It also may include, you know, some of the claims that have been asserted as secured that also, you know, may be administrative because they're post-petition for, let's say, consignment.

THE COURT: Okay.

MR. FAIL: But we've put it all together. We've put it all together here.

THE COURT: All right, very well. All right, thanks.

MR. FAIL: To answer your question, it's the Debtors' belief that in terms of funded debt, you know, that is taken care of and that shouldn't be an issue. The remaining secured is rather miscellaneous, if anything.

We go through additional detail of the sources of what has been recovered and where we see additional abilities to recover. On page 5, we compared to confirmation estimates for parties' reference so that they could see our recoveries. Excluding recoveries from avoidance actions, sources increased by 4.7 compared -- $4.7

million compared to our last report. And from confirmation estimates, excluding preference recoveries, there's an increase of $67.4 million, so positive news on that front and the sources.

On the next page, we detail the uses. And again, we compare not only to our last report, but also to confirmation date estimates. Our actual uses to date remain below confirmation date estimates; positive news, a positive report. Our total uses remain within confirmation date estimate ranges, and that's detailed here on page 6.

In terms of the update that we can report on, post-confirmation avoidance action recoveries. Page 7 highlights that approximately 60 percent of the eligible preference matters have been settled in terms of the number of counterparties. That is up from 37 percent roughly in our last report.

Settlements have resulted in the combined cash and administrative claims waiver of $50.6 million. That's up over $7 million or up over 17 percent since our last report.

The Debtors' performance and go forward projections remain consistent with our prior estimates. This case does remain challenging. The increased time during the bankruptcy pre-effective date (sound glitch) or expenses in the effective date period. The Debtors believe that these expenses would have been incurred in a post-

effective date period had the effective date occurred earlier.

The Court is aware of, you know, some large categories of expenses, including the claims reconciliation, but significant amounts and much more significant amounts have been spent to monetize the assets that have already been distributed, including asset sales and recoveries through litigation to date.

The Court will recall that the Debtors have distributed significant amounts of cash that were not available on the confirmation date, which is why it has taken three distributions -- three distribution periods to collect the money. This was not a liquid situation where all we're doing is pushing a button to make a distribution.

The Debtors stand ready to work with the remaining disputed creditors to resolve their claims. The preference teams are ready to work to resolve those aspects. The Debtors' financial advisors and other lawyers are available to work on the remaining claims. We have made significant progress and look forward to making this distribution.

Your Honor, I know Ms. Morabito is on the line and had wanted to address the Court from the perspective and on behalf of the administrative claims representative. But before I turn the podium over to her, I'm happy to answer any questions Your Honor may have.

THE COURT: No. You can go ahead, Miss Morabito.

MS. MORABITO: Thank you, Your Honor. Thank you, Mr. Fail. Good morning, Your Honor. Erika Morabito, Quinn Emanuel, on behalf of Gary Polkowitz as the administrative expense claims representative in this case. Mr. Polkowitz is also on Zoom today as well, Your Honor. Can you hear me okay?

THE COURT: Yes, and I can see you and him also.

MS. MORABITO: Thank you. So the reason we wanted to make a statement is, as Your Honor can imagine as this case continues to unfold, numerous admin creditors reach out to either Mr. Polkowitz or myself at least weekly, sometimes daily, sometimes with questions about their own individual admin claims and sometimes questions generally about when we see the end of this case coming, what our view is on an effective date.

And so, we see that many of them are participating in today's hearing and thought it would be helpful for them to sort of get, you know, our view of where things sit today.

Everybody knows this plan was confirmed on October 15th, 2019, which is almost two years ago. Mr. Polkowitz, of course, was appointed as the administrative expense claims representative about six months after that on March 13th.

As Your Honor may recall and many of the administrative creditors know, I had previously represented the ad hoc group of administrative creditors and worked closely with the Debtors, the UCC, and of course, the administrative creditors with the assistance of this Court to help construct the administrative expense claims consent program, which was included in the final order, as Your Honor knows.

So between Mr. Polkowitz and myself, we obviously have a lot of history with the case and the parties here. And while we're not always vocal at this hearing, we are certainly conscious of the fees and that's a sensitive issue to us. We have been working very closely behind the scenes in this case, particularly over the past 16 months, as many of the individual creditors participating today and listening and those that are not know, including what Mr. Fail alluded to earlier, which is pushing the Debtors really to get this third interim distribution out, both expeditiously, and we hope it will take place in the beginning of August and certainly in a meaningful amount.

But while we've done our best to work collaboratively with the Debtors and their professionals and they have to as well, it doesn't mean that we don't share some of the frustrations that have been expressed by the administrative creditors in the past; we do share those.

You know, I'm going to touch on a couple of them.

Specifically, we saw Mr. Wander's letter that was filed with the Court with request to getting more advance notice with respect to the financial reports. We share that concern. You know, we think the Debtors and their professionals should be able to get financial reports and presentations that they intend to file in advance of an omnibus hearing more than one or two days before the hearing.

Not that we don't understand the complexity that goes into those reports and the vetting process and the signoff that's needed. But, look, professionals are getting paid, all professionals, and I include myself in that bucket, are getting paid significant fees in this case and creditors and interested parties ought to have a little more time to review these reports in advance of the hearing.

And while the administrative expense claim representative does receive the reports, it's usually only three days or so before the hearing, and those are calendar days, those aren't business days. But it's just not enough time given that for a status in this case for those numbers to be properly diligence so that the admin creditor can also weigh in and present its view to the Court with respect to any of the numbers and financial reports presented by the Debtor.

And this is particularly important in this case and to Mr. Polkowitz because he is bound by a confidentiality agreement. So oftentimes when creditors reach out to us, we are unable to share certain things that we may know by the Debtors. This is one of the rare instances, and it's done quarterly, where the Debtors are required to disclose public information, and so, everybody should have an opportunity to view and vet and ask questions.

So this is something that we are working with the Debtors. This is not to say that the Debtors have breached any of its obligations.

I'm sorry. I have a 12-year-old responsible for two dogs going crazy. I apologize, Your Honor.

THE COURT: That's all right.

MS. MORABITO: I'm sorry. I stand and discuss, Your Honor, so I'm still trying to do this with a 12-year-old who has now wrangled my dog, so I apologize.

This is not to say that the Debtors have breached any of their obligations or haven't complied, that they've met the requirements. I'm sure that they have. But it's just a point of if they can, try to suggest maybe getting reports to the claims administrator hopefully within five days in advance of the hearing, even if it's in draft form, and trying to get what can be filed, understanding it may be

subject to updating at the actual hearing.

But if we can get things on file at least three days in advance of the hearing so people have a reasonable opportunity, including the Court, to be able to review and ask questions at the omnibus hearing. I think that would go a long way.

The second thing that we've shared frustration with, and the Debtors share the frustration with as well, is that, yes, it's been almost two years since the plan has been confirmed and it hasn't gone effective. We all know that there's many reasons for that and I don't need to get into those.

But I do think it's important to note that the administrative expense claims representative with the Debtors, with the committee, and with other professionals and few stakeholders in this case are continuing to work hard to come up with a construct that would get this case to an effective date sooner than waiting for the proceeds from the Transform litigation to come in.

I think we've all realized that waiting for that to happen could delay the effective date in this case potentially for years.

We are also not resting on the third interim distribution. I think it's great progress, and we think it's a significant amount. As Mr. Fail alluded to, it is

now 50 percent of what certain people agreed to on the opt-in. But given the amount of administrative costs to the estate continue to accrue, including professional fees, we are working on a construct. We've presented a construct to the Debtors. We have calls set up with them this week in more detail. I obviously can't get into that anymore today.

But the point is, and this is important for administrative creditors here, we are working to get this plan to go effective as expeditiously as possible. Nobody, not us, not the Debtors, and I'm sure not the Court are content with letting this case linger any longer than it has to.

To that end, Your Honor, we have had calls with counsel to Transform, with litigation counsel at Akin, with Mr. Brauner as the representative for the unsecured creditors' committee, the fee examiner, representatives from (indiscernible) for the structuring committee, and numerous administrative creditors.

It's clear from these meetings and calls that we all have to work together to get this to at least go effective. The good news is that there's no question that we all share the common goal and we're committed to trying to reach it. That said, we know the task at hand will not be an easy one.

And to complicate things further, Your Honor,

there are several administrative creditors that have their own individual claims, and they have reached out to Mr. Polkowitz and myself asking for assistance with respect to a resolution of those claims.

The difficulty that the admin expense representative has is his duty is to the admin creditors as a constituent, as a group, not an individual admin creditor. What Mr. Polkowitz cares about is the numerator and the denominator. We want as much money to come into the estate so that we can get the largest distribution so we can this plan to go effective.

Unfortunately, that means that in some instances, there are inherent conflicts between an individual admin creditor's claim where, for example, there could be a preference being sought against them, which of course, would then reduce the amount of the claims if the Debtors were successful on that and would increase the amount of the distribution to the other administrative creditors, and that obviously would be something that would be in the best interest of all the administrative creditors.

Notwithstanding that, we have done our best to serve as a conduit. So to the extent that admin creditors have reached out to us on a one-off basis and asked for assistance, the assistance that we have been able to provide is to make sure and request the Debtors and asking that and

others at least are in communications with those admin creditors who have not yet been able to reconcile their claims, and I think that process has worked.

I appreciate the Court's time in letting us share our perspective of where things stand. Both myself and Mr. Polkowitz are happy to answer any questions if the Court has any.

THE COURT: Okay. I don't. I think all your statements are very sensible and I agree with the approach that you and your client have taken as you've laid it out.

I did have, before this hearing, Mr. Wander's letter that also raised the issue you had raised about whether the report that Mr. Fail went through at the start of this hearing could not come out earlier than on a quarterly basis. Of course, the confirmation order in Paragraph 14 says that the update shall be no less frequently than on a quarterly basis and the Debtors have lived up to that.

But I think that the advance notice that you requested, particularly given the role that Mr. Polkowitz plays and the confidentiality constraints he's under, makes sense, so that if it can go out a week before the quarter, I think that would be constructive here.

MR. FAIL: Your Honor, if I may just respond briefly from the Debtors' perspective on how we've been

performing, you know. We also read Mr. Wander's letter. It is devoid of facts, right? So what isn't included is the fact that we filed our quarterly operating reports since confirmation.

THE COURT: No, it's clear, and Miss Morabita made it clear and it's clear --

MR. FAIL: No, I know Ms. Morabita, I know.

THE COURT: -- no matter what that you haven't done anything wrong. You've complied completely with the plan and the order. I'm just suggesting that subject to update, which you can do in the week before the omnibus hearing, it makes sense if you can do it to get the report out a week beforehand.

MR. FAIL: We're happy to, Judge. I mean, in the old days, we would be bringing printouts to Court with us, and this would be a supplement to my oral presentation.

THE COURT: Right.

MR. FAIL: We're in the world of electronic Zooms and we thought it was already something superfluous or extra that we were doing by providing this report.

THE COURT: I think --

MR. FAIL: To the extent that we can, we'll put it out there, we'll put it out there earlier. We also haven't been inviting, you know, Q&A from the creditor, individual creditor population, at the omnibus hearings.

THE COURT: Right.

MR. FAIL: So there's a balance.

THE COURT: I think that's fine. I'm saying this in part because of the nature of the administrative expense creditor body. A number of them are sophisticated and understand the Chapter 11 process and/or have capable counsel, but a lot don't and find the process difficult to understand. And I think the report is helpful to enable them to understand, but it's also helpful for them to be able to walk through it with Mr. Polkowitz or his counsel.

So again, this is not a criticism of the Debtors and it's clear to me that they have not breached anything in the confirmation order or the plan, but it's just a suggestion. That extra week I think would be productive on top of the clear desire that the Debtors have expressed to engage with the administrative expense creditors whose claims have not yet been resolved and the role that the administrative claimants representatives, i.e., Mr. Polkowitz, has as a conduit to the Debtors. So I think that probably is enough said on that point.

Does anyone else have anything to say on the status update?

MR. FAIL: The only other thing I would add, Judge, is that, as Ms. Morabito mentioned that she intends to provide a proposal to parties. The Debtors have also,

and I just figured, you know, that's behind the scenes, that's, you know, the normal Chapter 11 case trying to happen behind the scenes, but, you know, there are settlement proposals being contemplated. The Debtors are, you know, involved and making suggestions and proposals as well, and we're optimistic that we'll find a path forward together.

THE COURT: Okay, all right. I think it is fair to say that absent one of those proposals or a combination of them being finalized and put out on notice. The recoveries here, as I think was always the case, in large part will depend on the ESL litigation.

But you all are correct that that is complex litigation. The Complaint is over 200 pages, and I'm working on a series of motions to dismiss, which dovetails with another roughly 200-page Complaint in another case raising similar issues. And obviously those things, given the quality of the lawyers involved and the complexity of the arguments, take time and that's just the first stage in the litigation, of course.

I think all of the movants who made motions to dismiss in those two litigations would have to understand from the oral argument that took place that those motions are not going to be uniformly successfully and that that litigation will continue in some form. But it is high-

stakes litigation that if not resolved will involve a lot of discovery and ultimately, if it's tried, a complex trial.

So that shouldn't be a surprise to anyone, but I'm laying it out there, so they understand it.

MR. FAIL: Appreciate that, Your Honor. Thank you.

THE COURT: Okay.

MR. FAIL: The next item on the agenda is --

MR. ZENSKY: Excuse me, counsel? Your Honor, it's David Zensky. Can I respond to Mr. Fail's comments?

THE COURT: Sure. Can you just remind me who you're representing?

MR. ZENSKY: Yes, of course, Your Honor. We represent -- Akin Gump Strauss Haur & Feld. We represent the litigation designees in the complex litigation you were just discussing.

THE COURT: Right, the ESL litigation.

MR. ZENSKY: Yes. I just wanted to say so the Court is crystal clear. Mr. Fail referred to a settlement proposal. It's not something that has -- I'm not sure what part of the litigation --

THE COURT: Let me interrupt you. I assumed --

MR. ZENSKY: -- it was not us.

THE COURT: -- that both Miss Morabito and Mr. Fail when they were talking about settlement proposals were

not proposing or discussing a settlement of the ESL litigation. And so, my remarks were really to make the point that unless their proposals bear some fruit, there will be, I think, an inevitable delay here because the recovery to get to an effective date otherwise will be, I believe, dependent, at least in some respect, on the ESL litigation's outcome, and that's not something that's imminent.

And, of course, the committee, as a representative for all the unsecured creditors, is pursuing that litigation. I may have just confirmed it, but I took it as that the proposals that Miss Morabito and Mr. Fail were talking about were not to settle that litigation.

MR. ZENSKY: Thank you, Your Honor. I just wanted to make sure that the Court and parties were clear on that. Thank you.

MR. SMITH: Hey, Your Honor, I have a question about the ESL litigation with these people from ESL.

THE COURT: I'm sorry. Who is speaking?

MR. SMITH: Yes, sir. Yeah, I'm literally speaking because I'm wondering when the --

THE COURT: Could you just state your -- can you state your name, please?

MR. SMITH: My name is James Edmond Smith, and I am a senior director for Sears Roebuck & Co.

THE COURT: Okay.

MR. SMITH: And we were wondering when the senior retirement plan for ESL was going to be paid back before they expected to buy back the savings plan from everybody's litigation?

THE COURT: I don't know the answer to that question, but it's not part of the ESL litigation that we've just been discussing.

MR. SMITH: ESL is with Lampert, and Lampert is trying to acquire what --

THE COURT: Mr. Smith, please. This is not something that either I know the answer to, nor that I believe is, in fact, relevant to this case.

MR. SMITH: That's what he's trying to acquire and there should be absolutely no reason why --

THE COURT: Mr. Smith --

MR. SMITH: -- Mr. Fail feels he should oversee by doing any of my job because of the Hadco of a company, Orange company. You guys, there's -- I can't do everything, and I apologize for saying this right now -- but you need a wet master and you guys have to reflect better. This is not professional, and that's all I have to say.

THE COURT: All right, very well. Thank you. Okay.

MR. FAIL: Judge, could I ask a question?

THE COURT: Why don't we proceed then to the next matter on the agenda, which involves the discovery dispute and motion to compel under --

MR. FAIL: Judge, can I -- it's Garrett Fail. Can I just interrupt? Mr. Terence Banich from Katten is going to handle the adversary proceeding matter for the Debtors, but I just wanted to note. I think that items K and L on the agenda were inadvertently listed and that are not related and are not pending today. So I'll turn it over to Mr. Banich, but I heard you mention the discovery and I see that those letters were on there, and so, I just wanted to make sure that that --

THE COURT: All right. Really just focusing on the motion to compel under Rule 37.

MR. FAIL: Thank you.

THE COURT: But I saw Mr. Wander raise his hand. So before we do that, Mr. Wander, do you have something to say on the case conference.

MR. WANDER: Yes, Your Honor. Could I ask a question on page 7 of the quarterly report?

THE COURT: Sure.

MR. WANDER: It refers to initial avoidance action matters, 3,549 of them, and then the next line says total actions determined to be ineligible, 1,283. My question is, was that after adversary proceedings were filed that the

1,283 were determined to be ineligible?

THE COURT: Do you know the answer to that, Mr. Fail, or do we need to have someone from the preference --

MR. FAIL: I don't, but I guess I don't get -- I don't understand the relevance or importance of it, but I don't know it offhand also.

THE COURT: Well, it might be -- I mean, it's a legitimate question. I think the Debtors should ask one or more of the preference firms that I'm assuming gave that information to you, the preference recovery firms that gave that information to Weil Gotshal to prepare the report.

It goes to, I guess, the assessment of how the preference litigation was legitimately described to the parties in the case and how it's proceeded, that's all, and whether this was litigation or a potential --

MR. FAIL: It doesn't, right. I mean, it doesn't -- it just doesn't change this -- it doesn't change this report and there's nothing pending is what I'm saying.

THE COURT: I don't think it -- I don't know whether it does, but again, one of the aspects of this report is to compare the estimates that were made at the confirmation hearing. And I don't believe that preference litigation had been started then, so you can see that if you're looking at the preference claims, they could be described as claims that at the confirmation hearing people

thought might exist or it could be rather they'll report on the litigation that was actually brought, that's all. So I'd say --

MR. FAIL: I'll have more information by our next quarterly report, Judge.

THE COURT: Right. But in the meantime, they can supply that to Mr. Wander, that information.

MR. WANDER: Can I ask a follow-up question?

THE COURT: Sure.

MR. FAIL: It's like free discovery for a potential motion that's coming, Judge. I'm not really -- okay, we can do that.

MR. WANDER: The next line item is matter 7, and it indicates that that represents $523.7 million of transfers. My question is, what was the approximate percentage recovery that the estate got on that? I thought I saw a number somewhere of approximately 19 million, but I didn't know if that was it, which would be under a 5 percent recovery.

So, Judge, that's my follow-up question, Judge, and I'm happy to follow-up offline on this. It doesn't have to be answered right now.

MR. FAIL: I can answer that right now.

THE COURT: Well, it may not have to be answered ever.

MR. FAIL: I can answer that right now.

THE COURT: That type of information, unless it's already been made public, doesn't necessarily have to be answered since that is --

MR. WANDER: I thought it was public information.

THE COURT: Well, I don't know.

MR. FAIL: We say on the left side of the page that we've received a combination of cash and the claims labors of $50.6 million. Each case is different, each percentage is different, and we're not providing anything more than we've provided. It's not to the benefit of creditors.

THE COURT: Right. I've only required aggregate reporting on this.

MR. FAIL: Mr. Wander represents defendants in ongoing preference actions. It's inappropriate to provide anything further.

MR. WANDER: I was just curious if the Debtor is able to break out of the 50.6 million how much is cash that has been received and how much are administrative labor.

THE COURT: It probably is. But again, Mr. Wander, I've not required that for an obvious reason.

MR. WANDER: Okay. Thank you, Your Honor.

THE COURT: Okay. All right. So the next matter on the agenda is in Kmart Holdings Corp and Sears, Roebuck &

Co. v. Winiadaewoo Electronics America, Inc., and it is the motion of the defendant, Winiadaewoo to compel production of certain documents and answers to interrogatories. I've reviewed the motion and the exhibits, the plaintiff-debtors objection, and the reply.

I'll take appearances in a second, but -- well, why don't I do that now and then I'll ask my first question on this and then hear brief oral argument.

MR. BANICH: Good morning, Your Honor. Terence Banich for the Debtors and the plaintiffs in the adversary.

THE COURT: Good morning.

MR. CLARK: Good morning, Your Honor. My name is Perry Clark. I am counsel for the defendant, Winiadaewoo Electronics America Inc.

THE COURT: Okay, good morning. All right, so either of you could probably answer this. The focus of the correspondence and the discovery conference that I held and most of the briefing on this, certainly I think all of the objection and the reply, pertain to the document production request, Request for Production No. 3, "Documents concerning the 'due diligence evaluation' conducted by plaintiff referenced in Paragraph 21 of plaintiff's Complaint."

But the motion sought responses also to two interrogatories, Nos. 5 and 6. Is that still at issue or has that been resolved, the interrogatory aspect of the

motion.

MR. CLARK: Your Honor, this is Perry Clark for the defendant. That issue has not been resolved. We're seeking to compel interrogatory responses as well.

THE COURT: Okay. All right. Well, why don't I, I guess, focus on that first. The basis for the objection to the two interrogatories is that the interrogatories seek information protected by the attorney-client privilege and/or work-product doctrine. But the interrogatories ask, Interrogatory No. 5 asks to identify each person with knowledge or information concerning the due diligence evaluation referenced in Paragraph 21.

And Interrogatory No. 6 asks to identify the existence, custodian, and location and provide a general description of each document concerning the due diligence evaluation.

As to the first one, again, identify each person with knowledge or information. I don't see how that would implicate or be privileged under either attorney-client privilege or work-product doctrine.

MR. BANICH: I assume that question is directed at me, Your Honor?

THE COURT: Yes.

MR. BANICH: Terence Banich for the plaintiffs. Good morning. Yeah. I would suggest that the objection is

twofold in that, you know, we obviously want to be careful about when getting on the issue, subject matter of the due diligence investigation, dipping our toe into a substantive response and risking sort of a gotcha, you know, waiver argument.

But I would suggest on the merits of it, all of the information requested by those two interrogatories is reflected in our privilege log.

THE COURT: Right. But how is it -- I don't see how this is privileged though, right? It's an interrogatory and you're just identifying each person with knowledge or information, so you could say, you know, lawyer X or accountant Y that worked with lawyer X. But to me, that's neither a waiver of the privilege nor privileged.

MR. BANICH: Well, on that understanding, we'd be happy to just answer those two interrogatories referencing the same people and information that's reflected on the privilege log. That's fine, Your Honor. We're happy to do that.

THE COURT: And then there's the request for a general description of each document concerning the due diligence evaluation. Did the parties discuss what was meant by the term general description? I mean, again --

MR. BANICH: I don't recall such a discussion.

THE COURT: -- this didn't really come up in our

discovery conference, so this is really the first time I've dealt with this point with the two of you. Has that been discussed?

MR. BANICH: Right. I don't recall -- I'm sorry. I don't recall such a discussion with Mr. Clark during our separate conferences or certainly not when we had our conference with you, Your Honor. But I would suggest that the only -- in the context of this, again, the privilege log provides, you know, sort of a basic general description of the documents as Rule 26(b)(5) requires.

THE COURT: Okay. So Mr. Clark, are you looking for more than that with regard to Interrogatory No. 6 where you request to provide a general description of each document concerning the due diligence evaluation?

MR. CLARK: I'm sorry. Your question was are we asking for more than that in response to the inter- --

THE COURT: More than what is -- more than the description of the document in the privilege log, which is I guess Exhibit 5 to the motion.

MR. CLARK: No, I don't think so. If that's what they're going to stand on for the description of the document, we'll take that.

THE COURT: Okay, all right. I just want to get that out of the way. I think then that confirms that the real issue here is the Request for Production No. 3, which

is the request for the actual documents concerning the due diligence evaluation. And I'm happy to hear oral argument on that point, although again, I've reviewed the parties' pleadings on it.

MR. BANICH: Your Honor, Terence Banich for the Debtors. I'm not sure which -- if you'd like the proponent of the motion to lead off or the objector.

THE COURT: Well, I guess, I mean, this really, I think, generally goes with who has the burden of proof. And the burden of proof as to whether a document itself is privileged within the parameters of the privilege is on the party asserting the privilege.

But I did have a question, which is, there are two aspects of that. First, the elements of the privilege itself, either attorney-client or work-product, and it was not clear to me whether there is a dispute as to whether the elements of attorney-client privilege or work-product privilege or any of them are in dispute here.

Now let me start with this question. As far as the attorney-client privilege is concerned, then in part this is because it's in microscopic or almost microscopic print, which documents are relying on the attorney-client privilege for not producing?

MR. BANICH: Your Honor, thank you. Yes, and I recognize the font size on the privilege log. I guess

someone small tried to fit it all on a single page and not have the rows cascade over.

THE COURT: Right.

MR. BANICH: But I believe, yeah, I believe if you look at the second-to-last column from the right under the reason withheld is what it's called, some of them will contain references to attorney-client, work-product, or both. The majority of the documents -- they're not numbered, I mean, other than the control number that you see there.

THE COURT: Right.

MR. BANICH: So I can't really refer to them by row one or two without counting down. But the easiest way to reference that is just to see the reason withheld, and the descriptions are different to account for that difference.

But to answer Your Honor's question from the beginning and as we noted in footnote 1 of our objection on page 5, I don't read the motion or even the reply to challenge the -- to make an argument challenging whether or not the elements are satisfied here, and we note that in the footnote.

This really kind of is a broader -- the brush is broader, and it just goes to whether or not, you know, as a general matter, we can stand on the objection that the due

diligence investigation is opinion work-product and, in some cases, also were attorney-client communication, whether or not you could just withhold those generally. We're not duking it out about the elements really.

THE COURT: Okay.

MR. BANICH: You can see that in the motion papers.

THE COURT: That was my impression but let me ask Mr. Clark about that.

MR. CLARK: Your Honor, I didn't mean to interrupt Your Honor.

Our response to that is, we actually do dispute that the elements of both the privilege and the work-product based on the disclosure and the privilege log that a number of these documents were prepared by the data analysis and advisory firm that works with counsel with plaintiffs.

And what they seem to reflect and what we've pointed out in our moving papers is that, you know, the due diligence analysis has a factual component. It's not entirely, you know, the lawyer's opinion of whether or not the due diligence investigation was sufficient and, frankly, we don't care about that. I mean, we know that counsel for the plaintiffs thinks what they did was legally, that their opinion is that the due diligence is reasonable. What we're after are the facts underlying that due diligence

investigation.

And here, when you look at the privilege log, I mean, what looks like happened was it had a data analysis and advisory firm conduct an analysis of ordinary course of business and substantial new value and reach a conclusion.

And as we pointed out in our opening brief, you know, you can have a data analysis firm conduct a due diligence investigation and you could rely on that as your argument to say why you did a due diligence.

And so here, the dispute that we have over the applicability of the privilege relates to the fact that there are probably bare facts underlying this analysis that should be produced and the plaintiffs haven't carried their burden of showing that the information in their privilege log is actually legal advice or actually is a lawyer's opinion, as opposed to the bare facts.

And again, we're not interested in what the lawyers think about the merits or the reasonableness of due diligence. We just want the facts underlying. So that's the dispute about the elements.

THE COURT: But I think you -- I'm asking a more narrow question, and I think you're skipping a step. I'm asking whether there is a dispute that you have raised as to whether the documents that are being withheld here are covered by the work-product doctrine itself, which has, you

know, a specific set of elements that apply to it and a specific set of inquiry as to the input in it of non-lawyers and the capacity in which they were working and the capacity in which the document was prepared or the context in which it was prepared, et cetera.

I did not get the impression that you were making those types of arguments. They don't really appear in the motion, in contrast to the argument that under Rule 26(b)(3), they could be compelled to be produced notwithstanding the privilege, or alternatively, that the privilege was waived.

MR. CLARK: We are certainly making both of those arguments, Your Honor. And I think again, on the narrow question of does the privilege, does work-product apply to the documents in the privilege log. Again, our argument would be to the extent that the information on the privilege log identifies spreadsheets that contain facts, we would say that's not privilege.

THE COURT: But you haven't briefed any of that, right? You haven't briefed the -- look, there are scores of cases literally that discuss when factual information that is included in or made a part of a document is or is not subject to the attorney-client privilege or the work-product privilege, and that's not the issue that the parties have addressed here, those types of cases.

And I think if -- frankly, I think if that point had been raised, there would have been a different objection, I expect supported by an affidavit or a declaration that said, you know, the firm, the law firm retained so and so or consulted with so and so before the commencement of this litigation to prepare this information. We discussed what would be relevant as a legal matter. Or maybe it wouldn't say that; maybe it just said we had this information already and we used it.

But I don't think that issue's really been joined. You're free to join it. I just don't think it's before me today.

MR. CLARK: I understand. I understand Your Honor's notice you read the briefs. I think all I would say is that the issue, the way it's been played out as the parties were addressing it was simply our position that if they had said -- you know, there are a number of ways to prove due diligence. There's nothing magic about due diligence. It has to be done by a lawyer.

I think our point was simply that you could just provide the facts.

THE COURT: Well, I'm not --

MR. CLARK: And they're saying --

THE COURT: You know, I'm not so sure that's really the case here given that what the statute says in the

new language that came in the pleading of 2019. The trustee may, based on reasonable due diligence and the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses. If you're referring to affirmative defenses, you really -- that's a legal issue, right? You need to -- I mean, it's at least reasonable or logical to assume that the bean counter has to be instructed as to what's relevant as far as an affirmative defense.

MR. CLARK: I think that's right, Your Honor, and I think, you know, congress when this language was inserted obviously made pains to say it's due diligence in the circumstances of the case. And, you know, I don't think of this requires that a plaintiff, you know, point to their Rule 11 analysis, their prefiling investigation. I think congress left it up to, you know, the circumstances of the case, and any number of things would meet the due diligence requirement. I don't think --

THE COURT: But it's -- but again, I'm going back to the point that I started this line of questioning about, which is are the parties fighting about whether the privilege applies -- the work-product doctrine privilege or the attorney-client privilege -- or really are they fighting about whether Rule 26(b)(3) requires disclosure notwithstanding the privilege. And my distinct impression

is that what they were fighting about is the latter, and that may well include -- does include the points you've been making, the difference between facts and opinion, for example.

But it's clear from the case law, although the parties didn't brief it because I don't believe it was raised, that attorney work-product can and, in fact, usually does include plenty of facts, just raw facts because that's what lawyers do; they take the facts and apply the law to them.

And it appears here in this statute that congress is requiring due diligence that pertains to a legal issue, which is the applicability of defenses, as well as, of course, to the elements of the -- other elements of a preference claim, and someone needs to be instructed by that.

So I don't think what you're fighting over here is, for example, whether a preference run by an accounting firm was done at the instruction of and as part of the preparation for this lawsuit, as opposed to just a run that they had done, you know, years ago.

I think what you're arguing about is Rule 26 and waiver, so I think we should get to that point. Again, if you want to make the other argument, you can, but just not today because I don't think it's been made. So with that, I

think we should get to the Rule 26(b)(3) point and also the waiver issue.

MR. BANICH: Your Honor, would you care for me to address those points?

THE COURT: Sure, why don't you go ahead on that point.

MR. BANICH: Okay. I understand that as the party claiming the applicability of the work-product doctrine here, it's our burden to establish that, at least on a prima facie basis, it applies.

And I think as Your Honor concluded, at least preliminary at our discovery conference, which now seems like such a long time ago, that our privilege log accomplished that. I believe Your Honor made a comment or two to that affect.

At the core of the matter is these documents that where most of them are spreadsheets where we, as Your Honor discussed earlier, the preference professionals that's a combination of Katten and Acumen, now known as Stretto, went through the portfolio of potential preference targets to figure out what the potential exposure was.

And that is the document, there's a few iterations of it, that's the document that Mr. Clark wants produced. And I think the first task here is to get into whether or not, as I think Your Honor preliminarily concluded, that

these documents are inherently opinion work-product. And if that's the case, that is the end of the line. It's the end of the discussion because, as we emphasize in our papers, Rule 26(b)(3)(B) states that the court must protect against disclosure of opinion work-product, and several cases talk about how it's virtually undiscoverable and such.

So I think, I would suggest that the first task here is to figure out what bucket, if you will, these spreadsheets fall into. And as we talk about, in our objection, is fact work-product an opinion work-product. Fact work-product is, on the face of it, not discoverable, but can be compelled to be produced. Opinion work-product is much different.

And we, in our objection I think, very clearly explain why a spreadsheet analyzing whether or not we have a good cause of action against the defendant and what their defenses might be worth is, by definition, an example of opinion work-product.

THE COURT: Well, can I stop you at that point?

MR. BANICH: Of course.

THE COURT: A spreadsheet can say a lot of different things, you know, you can have a lot of different columns on it. The Complaint in this adversary proceeding says that the plaintiff, in Paragraph 17 and it attaches also as an exhibit, analyzed data, including invoice number,

invoice date, invoice amount, and clear date. And then, Paragraph 21 says, “Players perform their own due diligence evaluation.” Paragraph 22 says, “After performing their own due diligence valuation.”

So a spreadsheet could have a column with -- which is somewhat similar to Exhibit A, it could list invoice number, invoice date, invoice amount, clear date for each of the payments and the statement of account. It may also have a column that shows historical payment information, you know, payments within a band over the previous one year.

It shows when those payments were. So to me, that would probably cover most defenses. It might -- you know, you might have a column that says any new value. It doesn’t necessarily have to have a column that puts a percentage recovery on it, right? I mean, a spreadsheet wouldn’t have to say that. It might not.

That might be the separate memo that the spreadsheet’s attached to. So I understand very well your distinction between opinion work product and fact work product, but I’m not sure that the descriptions in the privileged log highlight whether the fact work product could be isolated from the opinion work product.

MR. BANICH: All right. Well, I would say as an initial matter that I also -- the defendant has also not challenged the -- at any point, the adequacy of our

privileged log. This -- the issue has always been the more esoteric issue of whether or not due diligence materials are discoverable legally.

THE COURT: I understand.

MR. BANICH: So we -- all right, fair.

THE COURT: And that was the subject really of our conference, that there was in essence --

MR. BANICH: That's right.

THE COURT: -- Congress forced a waiver, if you're going to refer to it in your complaint --

MR. BANICH: Right.

THE COURT: -- there's a waiver.

MR. BANICH: Right. And we covered that in the discovery conference.

THE COURT: Right.

MR. BANICH: And I'm happy to discuss that again, if you would like.

THE COURT: No. I'm really focusing on this other issue, which I think is --

MR. BANICH: All right.

THE COURT: -- really the one that Mr. Clark is primarily focusing on, which is one could under -- he's saying -- Rule 26(b)(3), and particularly (b)(3)(b), protect against disclosure of the opinion work product. And still provide the information on the payment history, which I'm

assuming is in their spreadsheets.

MR. BANICH: Very well. Well, let's -- I guess we have to -- there's a couple of points to unpack there. And the first is what exactly are we withholding? Because you know, a spreadsheet as Your Honor correctly points out could contain a lot of information or it could be much more simplified.

The -- I would start out by saying that the document we've actually withheld is basically a top line analysis of gross transfers and what we think the case is worth net of various defenses. And it's not only for this defendant, it's a spreadsheet that covers many targets and defendants.

THE COURT: All right, but they --

MR. BANICH: One line of which is this defendant, all right, I guess there's two defendants.

THE COURT: Okay, but there -- I mean, there are, I don't know what, about 11 documents I think that are referred to on the privileged log. So again, I --

MR. BANICH: Right. Right. They went through different models as time went on. You know, there was different versions of the spreadsheet. It got updated as, you know, further analysis was conducted. So there's different versions of the spreadsheet.

We logged them separately, which is why you see

them like that. The underlying facts that roll up into this conclusion, this analysis, we've all produced to Mr. Clark separately. He has all of the underlying data -- the payment histories and so on.

This is -- this we're -- that sort of factual information upon which the conclusion is based have been produced. So naturally we would have produced that. We produced that to all defendants. You know, but it's not in our interest to hide that information.

But the actual document we're talking about here is quite different. It was for -- made for internal use, you know? And it has the -- it contains an application of the statutory defenses to what we perceived the facts to be about the transfers at issue, the parties' historical payment relationship and the assessment of our -- what we think new value and ordinary course might actually be properly valued at.

So in effect, we're analyzing the strengths and weaknesses of the case in this document. It's totally separate from the underlying data that holds up --

THE COURT: So just to summarize then, you're saying that you can't pull out the raw data, which you say you've already provided any of that, but you're saying you can't really redact the opinion analysis, because that's essentially the whole document?

MR. BANICH: Well, that's correct. I mean, I'm saying that the underlying data doesn't even appear on this particular spreadsheet. It's a totally -- this spreadsheet that we're -- we've withheld is for bottom line or top line, depending on your perspective, analysis of gross transfers and then some columns about what the likely defenses are worth.

THE COURT: What about the column headings? Do they -- do the column headings themselves give any conclusions? Or do they just show the questions that were asked?

MR. BANICH: I believe the column headings on this particular document might say like gross transfers, net new value, net of OCB and new value or some words to that effect. And obviously, objective information like what the name of the defendant is and things of that nature. Not very revealing on their own, but that's what they would be.

THE COURT: Well, I guess, I mean, this is more of a question for Mr. Clark. When you look at 547(b), the introductory clause that was added, and the most recent amendments, one could certainly take the view that Congress wanted the plaintiffs in these types of witness actions to perform due diligence, not to inquire into the conclusions they reached.

So one could take the view that what's really at

issue is just the headings as opposed to the opinion information that's underneath the headings. And even as to the waiver point, they're not offering the substance of their legal analysis, they're simply reciting in the complaint and then assuming if it becomes an issue at the trial, they will introduce evidence that they performed due diligence.

And it would seem to me that the headings are what they would rely on and arguably what you're entitled to, but not their legal conclusions. I mean, I don't think Congress said, in fact, I know it didn't say it because it's not in the statute, that before you bring such a preference place, you have to assume that you have a greater than, I don't know, 35 percent estimate of succeeding. I mean, Congress I guess could've said that --

MR. BANICH: Right. No I think that's --

THE COURT: -- although, they would've blown the attorney/client privilege and work/product privilege out of the water if they did. They just said there had to be reasonable due diligence.

MR. BANICH: So you're absolutely right. They didn't say that. I think -- and I think Rule 11 covers the (indiscernible) investigation, where to bring the claim, all you have to do is have a reasonable good faith to lead with the facts and the laws to put it.

I think what Congress was saying was that plaintiffs shouldn't bring preference actions on transfers where they know that there is a substantial new value defense or an ordinary course of new business defense.

THE COURT: Well, except it doesn't say that.

MR. BANICH: Well, it says -- okay.

THE COURT: It just says has to perform reasonable due diligence.

MR. BANICH: Right. But I think -- so in this case, there are hundreds of transfers that are asserted in the preference action. And the plaintiff's position is that every single transfer in the transfer -- in the preference period does not have a defense. It does not have an ordinary course of business defense and does not have a substantial (indiscernible) value defense.

THE COURT: Congress didn't say that, either. Congress doesn't say there can't be any possibility of a defense. There's just reasonable due diligence. I mean, I just -- I -- as we all know, defenses are subject, in most cases, although I have had a couple, a good 20 years, where the defense won at summary judgment. It's usually a fact issue.

MR. BANICH: Right, right. And again --

THE COURT: Where there's a dispute.

MR. BANICH: Right. And far be it for me to say

what Congress intended, but it looks like from the amendment of the statute, Congress intended something different than what existed before. And what that is, it seems like is an analysis of the reasonably knowable affirmative defenses and a due diligence that is reasonable in the circumstances of the case.

And here, what we're asking for is just an identification of what that reasonable diligence was. And their answer is that it's categorically work product. And if they're going to say in discovery that it's categorically work product, then they shouldn't be allowed to close the work product at some future date and say, oh, here's everything that shows the new diligence.

And it may be that there's a conclusion in this case that as a matter of law, a due diligence investigation, you know, means you can't be -- they may be (indiscernible) about what that means and that they need not prove anything. And if that's the case, that's the legal conclusion.

But if there is a conclusion that they have to prove something related to due diligence, the fact that they're refusing to identify that proof in discovery, we think means they shouldn't be able to rely on that for somewhere down the line.

THE COURT: Well, I was positing to you that I could compel them to produce the headings on these

spreadsheets, but not the conclusions underneath the headings.

MR. BANICH: That's interesting. So sort of -- we're envisioning a spreadsheet as saying, you know, the Column A is a preference, it's -- Column A is a payment. Column B is like an invoice for a shipment. Column C is like a median base of payment or whatever.

And then, there's this like, extra column that says sort of given the preceding columns, here's the percentage likelihood we think we'll get on this claim.

THE COURT: Right.

MR. BANICH: Right, right. Well, we'd love to get that, I mean, certainly. I'd be surprised if that was the way that spreadsheet was setup. But I would agree with you, those preceding columns are certainly not work product.

THE COURT: Well, it -- they might well be if they -- again, that was the first 10 minutes of this oral argument. It's not really -- you hadn't really briefed that issue. Work product very much can include the work of a non-lawyer, clearly. I mean, it can include an investigator's work.

It can include insurance adjuster's work. It can include all sorts of people depending on when they were retained and how they interacted. So just the fact that it's a fact doesn't take it out of the work product

doctrine. If you want to brief that issue, you can, but it's not really covered in this motion. So --

MR. BANICH: And we certainly can. I mean, sorry.

THE COURT: So Mr. Banich, I interrupted you on this point.

MR. BANICH: Sure.

THE COURT: But I think in reviewing these pleadings, I was coming out basically as follows. First, I think I probably do need to see these spreadsheets in camera, just to make sure that they are what you say they are. I -- and I appreciate there really hasn't been an objection to the privileged log per se.

But I think it goes to the second part of my -- of where I was coming out based on reviewing the pleadings, which is that I don't think in this language and in 547, Congress intended to blow a hole in the well-established and sacrosanct, except for limited specific exceptions, attorney/client work product privileges.

So and it would appear to me that the very clear exception in Rule 26(b)(3)(b) would in any event shield the production of conclusions, opinions, evaluation. But that the fact of a -- of the valuation, which could be evidenced by the headings, just as it is evidenced by the language in the privileged log itself, while arguably work product, in fact it is work product, I think is just a fact that the due

diligence occurred and could be compelled to be produced.

So I -- I'm just laying that out there to both of you. And Mr. Banich, you can respond however you want, including making other arguments, but I would like you to address those two points.

MR. BANICH: I'm happy to, your Honor, thank you. A couple of points. I would go back -- first of all, let me pick up on one of Your Honor's comments of a moment ago, of how you're, you know, a tentative ruling I guess that Section 547(b) as amended does not to, as Your Honor's expression, blow a hole in attorney/client privilege or work product.

It -- obviously, that is consistent with our position in the briefs. It's consistent with the plain language of the statute as amended. It doesn't say anything about privilege or work product. And on top of that, with regard to the idea that we would have to produce a, I guess a redacted version of this document showing the headings, I would ask, if it's -- if the conclusion is that the statute didn't change anything with regard to work product, then you know, why is it that we would have to produce a document, even redacted, that is --

THE COURT: Well, it didn't -- no, I'm sorry -- it did change something as to work product. It made due diligence relevant. The fact that due diligence was done is

relevant. So it does implicate, I think, 26(b)(3)(a). It's just --

MR. BANICH: Right.

THE COURT: -- it didn't go so far as to say that -- I think it's process focused, as opposed to conclusion focused, as far as the due diligence.

MR. BANICH: Right.

THE COURT: And so --

MR. BANICH: But I think Your Honor -- yeah, I'm sorry.

THE COURT: -- I think it did make that inquiry relevant, which is why it's in the complaint. But it would seem to me that it's the process, i.e., the process of what goes through, similar to the process in the ResCap case of deciding whether a settlement is reasonable.

You don't have to go through the conclusions and all of the debate going back and forth, but just that the process happened in a context where you have, you know, in this case, a very large set of preference claims that aggregate a large amount of money. And you know, there was an analysis done.

Now I guess Mr. Clark could say, well, what's to prevent someone from just putting headings on and then in real life having nothing underneath, no column, a column that says percentage recovery or likelihood of recovery and

then having nothing in it? Or just having 100 percent at each one?

But I think frankly that's unlikely here, and probably something that is not a sufficient basis to believe that the Congress meant to have the sort of a blanket waiver of the privilege.

MR. BANICH: I agree with that. I would go back to Your Honor's analysis from the discovery conference, when we discussed this very issue. And I believe Your Honor -- when raising -- when responding to or discussing Mr. Clark's point about, well, he wants to guard against us, you know, dropping on him presumably in a pre-trial phase, you know, a document that we've withheld as work product up until that point.

And Your Honor was like, well, you know, if they don't produce it in discovery, we can't use it. Rule 37(c) is very clear about that. And but on top of that, Your Honor, so well, the privilege log is the proof that it was done. And I think that's still the right answer.

You know, going to show -- unless someone's challenging the -- unless the defendant is challenging the detail in our privileged log, which they are not, I don't know why we would have to go beyond what's in the privileged log.

That is the purpose and function of Rule 26(b)(5).

And if someone is not challenging a privileged log, that means we've satisfied that rule and you shouldn't ordinarily go beyond it. That's the purpose of the log. It puts them on notice of the nature and basis of the claim and we've done that. They don't challenge it.

So I would suggest that Your Honor was correct at the discovery conference and said, well, the evidence would be the privileged log. So the -- and obviously, I mean, it's -- it goes without saying if we're trying to protect this document now, we're not going to use it at trial. I -- Rule 37(c)(1) itself executing in that regard, if we don't produce in discovery, we literally can't use it.

So Mr. Clark can take some solace in that. And so, with regard to your -- the other points, although I'm happy to provide the spreadsheet in camera, you know, it does deal with lots of other targets and defendants, some reluctance to provide that --

THE COURT: Well, you could just do the pages that pertain to the -- when they will --

MR. BANICH: I understand, we could do that. So the -- but it's important that, you know, I emphasize my agreement with Your Honor's analysis, that you know, the conclusion of what, you know, analysis and what a case is worth is -- falls into your categorical opinion work product, or opinion work product bucket, which is

categorically non-discoverable.

So I continue to question what the purpose would be of producing even the spreadsheet with just the column headings, if our privileged log is not being challenged given the purpose of Rule 26(b)(5), which is to put them on notice of the basis for claim or privilege.

THE COURT: Okay, and --

MR. CLARK: And if the privilege log has not been challenged, obviously we've satisfied that rule and shouldn't have to go beyond it. So --

THE COURT: Okay.

MR. CLARK: -- just if I could just respond?

THE COURT: Sure.

MR. CLARK: So on the 26(b)(5) point, 26(b)(5) just says that if you withhold documents, you have to provide the privileged log. It doesn't say that if you provide a privileged log you are not -- you'll prove you can submit the privileged log as hearsay proof of the truth of the matter of the documents listed on the privileged log.

The privileged log's a double hearsay. So I wouldn't say we're not -- I mean, say we're not challenging the privileged log if they -- it is not true. I mean, it was challenged --

THE COURT: Well, you know, and you're also saying that if one got to a trial on this there might be an

evidentiary issue just relying on the privileged log. And the plaintiff may want to rely on the headings, right?

MR. CLARK: Well, right, right. And it just -- it doesn't -- I've never seen -- I've never been in a situation like this, where somebody said that their privileged log is proof of something they allege in their complaint. That just -- I mean, if you can do that, that would be an important thing to know, I think in the bar, because there are a lot of situations where you're telling like an expert or an investigator or something, you know, go look at this, give me your opinion and then you could just get the opinion back, or like a data analysis firm.

Basically like you hire a CPA. Like you would hire a CPA to say look at this, then tell me your response, and then you could just put it in a privileged log and (indiscernible) --

THE COURT: Well, no, there's a separate -- there's a whole separate set of rules dealing with expert testimony. But anyway --

MR. CLARK: Right, totally.

THE COURT: -- I understand your point about the evidentiary effectiveness.

MR. CLARK: Right. And then, if I could just -- yeah, another point, I really -- I doubt that this document that you're going to get has these percentages. I mean, I

think what it probably says is the claims are reduced in amount by the substantial lead value. I don't know that it -- I mean, I guess that is a percentage.

But there's two types of percentages, right? There's like, a likelihood of recovery percentage, and then just a percentage amount that they're entitled to, right? Because you know, you get the $100,000 preference payment and you ship $95,000 worth of goods. Like that -- you would get only five percent of that payment, right?

And that's not -- but that's different than you have a 75 percent chance of getting that five percent. So I'd be surprised if that was what that actually said.

THE COURT: Okay. All right. Anything else?

MR. SMITH: Yes, Your Honor. I would like to know (indiscernible) --

THE COURT: No, Mr. Smith. I'm still on this matter. I'm only talking to Mr. Clark and Mr. Banich. We'll get to your matter next.

MR. SMITH: (indiscernible) --

MR. CLARK: I'm sorry. I do have just two sort of housekeeping things. So we talked earlier about the interrogatories. And I just wanted to confirm that we're going to get supplemental interrogatory responses, like signed interrogatory responses as we discussed.

THE COURT: To those two interrogatories.

MR. BANICH: What I had proposed to do, and is to simply say in response to those interrogatories without waiving, without being subject to some sort of argument, that by answering them, you know, it affects some sort of waiver in a got-ya manner, I would ask to the objective issues of who has knowledge and what the documents are about.

Interrogatory responses are going to say read or privileged log, as I said earlier. Because it contains all that information.

THE COURT: Including the --

MR. BANICH: I'm happy to do that.

THE COURT: -- including the names of the individuals and the like?

MR. BANICH: Well, yes, because the privileged log contains a column of who the --

THE COURT: Okay.

MR. BANICH: -- senders and recipients sign.

THE COURT: All right.

MR. BANICH: And that's fine.

THE COURT: That's fine.

MR. BANICH: I mean, that's --

THE COURT: And that's clearly not a waiver of the privilege.

MR. BANICH: That is --

MR. CLARK: That's fine.

THE COURT: Okay.

MR. BANICH: Yeah, we will do.

MR. SMITH: And then the second --

THE COURT: Okay.

MR. CLARK: You know, Your Honor, I'm sorry if the papers -- if we didn't make clear our objection -- our like, dispute about the notion that we think the facts underlying the opinions or the facts that are referenced in the privileged log, we think under 26(b)(3) those are discoverable.

THE COURT: No, but that's a different point. Maybe I wasn't clear how I started this argument off. Rule 26 is a mechanism for compelling discovery of otherwise -- of privileged material. And you made that point clearly, and I've addressed it. There's a separate argument that I don't believe was made, and I wanted to make sure, and I think I have the answer, it wasn't.

It could be sometime in the future potentially, but it wasn't made in this motion, that the information you're seeking in document request number three and in particular as it pertains to the documents that are described on the privileged log, isn't in fact privileged at all. That's a separate point. And I don't think that point was raised. I think that --

MR. CLARK: I understand. I'm sorry. Yeah. Sorry, Your Honor. I misunderstood.

THE COURT: Okay, all right, very well. Okay. I have before me a motion under --

MR. CLARK: I'm sorry, Your Honor. I'm sorry.

THE COURT: Oh go ahead.

MR. CLARK: Sorry. One more. Is the Court going to issue and order or --?

THE COURT: Yeah, I'm going to give you my ruling.

MR. CLARK: Okay.

THE COURT: And then I'll ask you to provide the order.

MR. CLARK: Understood.

THE COURT: That's consistent with my ruling.

MR. CLARK: And so, you'll do that in a separate --

THE COURT: I'm going to do it right now.

MR. CLARK: Okay, I'm sorry.

THE COURT: And in bankruptcy cases, since we don't have magistrates to help us out --

MR. CLARK: (indiscernible) --

THE COURT: -- I rule about 99 percent of the time from the bench because otherwise, their work just wouldn't get done and people need propped answers, if I could give them to them. So I have before me a motion by the defendant

in this adversary proceeding, WINIADaewoo that's W-I-N-I-A-D-a-e-w-o-o, Electronics America under Federal Rule Bankruptcy Procedure 7037, which incorporates Federal Rule of Civil Procedure 37, to compel document production and interrogatory responses.

We've resolved the aspect of the motion that seeks to compel responses to the movants' interrogatories'' number 5 and number 5 as set forth on the record, which will simply be providing the same information that is on the privileged log that's attached as an exhibit to the motion. And the parties have focused, therefore almost entirely, except for resolving that point, on the motions request for production number 3, which seeks documents concerning the "due diligence evaluation" conducted by plaintiff referenced in Paragraph 21 in plaintiff's complaint, which is also referenced in Paragraph 22 of the complaint and arguably dealt with in Paragraph 17 of the underlying complaint.

The Plaintiff's objection to the motion is premised on the ground that the documents that have been withheld, which again are on the privileged log that I've already referenced, are in fact properly withheld on the basis of privilege, and that the production of the documents is barred in addition by Bankruptcy Rule 7026, which incorporates Federal Rule of Civil Procedure 26(b)(3).

The parties have primarily focused on the

applicable law here being federal law, which is in fact what they should've done. As the federal common law privileges applies, when federal law determines the substantive rights of the parties, which is the case here, given that the underlying lawsuit is a creature of the Bankruptcy Code wholly, i.e., the avoidance of preferential transfers under Section 547 of the Bankruptcy Code.

See Drennan v. Certain Underwriters at Lloyd's of London (In re Residential Capital, LLC) 575 B.R. 2935 Bankruptcy S.D.N.Y. (2017). The record I think clearly reflects that the motion does not assert that the work product and attorney/client privileges don't pertain to the documents listed on the privileged log.

I.e., the motion does not dispute any of the elements of those applicable privileges as set forth in Upjohn Company v. United States, 449 U.S. 338, 390, 1981, or the -- as to the attorney/client privilege or the work product privilege as originating with Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

Rather, the motion seeks to compel discovery of the documents under either a theory as that Federal Rule of Civil Procedure 26(b)(3) is applicable to the documents listed on the privileged log, or by a theory of waiver. The first theory, again, is based on Rule 26(b), and it provides that with regard to trial preparation, that is the basis for

the withholding of almost all of the documents here.

"Ordinarily, a party may not discover documents and (indiscernible) things that it prepared in anticipation of litigation or for trial by or for another party or it's representative, including the other party's attorney, consultant, surety, (indiscernible) insurer or agent."

But subject to Rule 26(b)(4), those materials may be discovered if they are otherwise discoverable under Rule 26(b)(1), and the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

We are not talking here about expert witness preparation or materials, which is covered by 26(b)(4). What we are talking about here is whether the documents on the privileged log fit into the exception in Rule 26(b)(3)(a).

Now I should note before proceeding that that rule applies only to what would normally be viewed as the attorney -- as the work/product privilege and not the attorney/client privilege. And certain of these documents are claimed to be protected under the attorney/client privilege.

But as to the extent that the attorney work or the work product privilege is relied upon, one first needs to

determine whether the materials are relevant, which is generally the requirement for Rule 26(b)(1), particularly here, where there's no objection based on burdensomeness or any sort of balancing analysis.

And then, also one needs to determine whether there is a substantial need for the materials for the defendant to prepare its case, and whether without undue hardship, they could be obtained or they're substantially equivalent be obtained by other means.

The materials are relevant to a new provision of the bankruptcy code, new based on the most recent amendments to the code from 2019. The Congress in those amendments added language to the preference avoidance provision of the Bankruptcy Code Section 547 of Title XI.

It stated now in the introductory clause to Section 547(b) in relevant part, the Trustee may, and then here is the new language, "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under Subsection C, avoid any transfer of an interest of the Debtor in property."

And then it goes on to list the elements of a preferential transfer in the rest of Section B of 547, and then the defenses in Subsection C. As this provision is new, there are not a lot of cases construing it, but they do

state a common theme, which is also well-stated by the leading treatise on Bankruptcy Law, Collier on Bankruptcy, which states in Paragraph 547.02(a), "One can only speculate about the reasons for the change. The most plausible explanation is that it seems to have been the practice for Chapter 11 liquidating trusts to employ what are called in the vernacular preference mills.

The same practice may also be prevalent in large Chapter 7 cases. These entities pursue preference actions for the Trustee and take a percentage of the recovery. Their business model is simple.

They take the list from the Debtor's statement of affairs of all payments the Debtor made in the 90 days before bankruptcy and filed preference actions against all the recipients without undertaking any investigation of the merits of the causes of action, such as whether the transfer was ordinary course, whether it was COD or otherwise a contemporaneous exchange or any other defense.

That they file adversary proceedings in the home court, the defendants have to hire a distant counsel to defend. And this becomes very expensive to defend the action and makes economic sense for the defendants to settle for nuisance value or the cost of defense."

Again, that's at 5 Collier on Bankruptcy, Paragraph 547.02(a). The reason one has to speculate for

the reasons for the change is that there's no relevant legislative history for this amendment, although it also was discussed in the American Bankruptcy Institute Commission to study the reform of Chapter 11 at Pages 148 - 151 2014, available at https://abiworld.appdocbox.com.

The limited case law is not clear as to whether reasonable due diligence is in fact an element of the cause of action, although it is stated as an introduction to the cause of action. One Court has concluded it is. Husted v. Taggart (In re ECS REF. Inc.) 65 V.R. 425, 457-58 (E.D. Cal. 2020).

Others have stated that they're simply not sure, and don't need to decide in the particular context where the issue arose. See Solars v. Anixter -- A-n-i-x-t-e-r -- Inc. (In re Trailhead Engineering LLC) 2020 BNKR Lexus 3547 at 19-20 (BNKR S.D. Texas December 21, 2020) and Faulkner v. Lone Star Brokering LLC (In re Reagor -- R-e-a-g-o-r -- Dykes -- D-y-k-e-s -- Motors LP), 2021 BNKR Lexus 1643 at Pages 5-7 (N.D. Texas June 18, 2021).

Those two cases, as was the case also with the Trail -- I'm sorry, the ECS REF Inc. involved motions to dismiss, and they focused on the language in the complaint. The two Texas cases that I have cited both focused on more than conclusory allegations of conducting due diligence and focused on that the Trustee had reviewed the Debtor's bank

and (indiscernible) records, invoices relating to the alleged transfer, correspondence of irrelevant contract.

All to show that a level of discretion in bringing the lawsuit was involved, i.e., it was not the type of preference mill activity described in the Collier quote. This is certainly a consistent interpretation with the statute itself, which again simply says the Trustee may, based on reasonable due diligence in the circumstances of the case, and taking into account parties' known or relatively knowable affirmative defenses, avoid a preferential transfer.

Congress did not say that the reasonable due diligence have resulted in a conclusion of a, for example, percentage likelihood of recovery or any likelihood of recovery at all for that matter. But simply that there was a reasonable amount of due diligence taken, including with respect to available defenses, which in fact can be taken by looking at the underlying facts for those defenses with the legal context of them as set forth in Section 547 of the Bankruptcy Code.

That would involve more than just getting a payment run of payments made during the 90 days before the commencement of the Bankruptcy case, but also look at the records to show that there was -- payment was on account of (indiscernible) the debt, and that it was not subject to a

defense, unless the defense was taken into account in bringing the lawsuit.

There is a suggestion in the motion that the very operation of the statute itself in essence requires disclosure of the actual due diligence that was done, including the underlying analysis as to the merits, both the preference claim and the defense itself.

I do not read the statute that way at all. It is processed based, not a statute based on the underlying substance of the analysis. And I believe the case law has interpreted it that way as well. I do so not only based on the plain language of the statute and the albeit limited case law, but also upon the fundamental importance of the attorney/client privilege and the work/product privilege and their long-standing nature.

See, for example, Pritchard v. County of Eerie (In re County of Eerie) 546 F3d 222, 228 (2nd Cir. 2008), which discusses the importance and long-standing nature of the attorney/client privilege, and in light of that and its purpose, the need to read new waivers or new assorted waivers of the privilege narrowly or carefully.

It is also well recognized as a principle of statutory interpretation in addition to those two points, that when interpreting a statute that is asserted to have substantially changed a regulatory or legislative scheme,

the Court should assume that Congress did not hide elephants in mouse holes.

Epic Systems Corp. v Lewis, 136 Supreme Court 1612, 1628 (2008). And frankly, I believe it would be shocking here if Congress meant a waiver of the privilege so that the actual merits of the due diligence analysis would be required to be disclosed given the legal nature of that analysis as a result of the new language added to Section 547(b).

Again, it's much more likely and a reasonable interpretation given the plain meaning of the statute and the foregoing case law and principles that the statute requires a process evaluation both in terms of the allegations of the complaint and ultimately at trial.

So the information that a defendant would need here for purposes of Rule 26(b)(3)(a)(ii), where it must show that it has a substantial need for the materials to prepare its case and cannot without undue hardship obtain their substantial equivalent by other means, is a need to respond to the assertion that as a process matter the plaintiff engaged in reasonable due diligence for purposes of Section 547(b).

That information really is within the control of the plaintiff. And so, therefore, the second clause of (ii) would apply. However, the need only really applies to the

process point, not to the analysis, the ultimate percentage or other analysis of the merits or the recovery value of the claim. It rather needs to go only to the process.

In any event, given the nature of that analysis, which would be opinion work product, it would in all likelihood and in any event not be subject to discovery because of the case law pertaining to discovery of opinion work product and the application of Rule 26(b)(3)(B), which states that if the Court orders discovery of those materials, i.e., the materials covered in 3A, it must protect against disclosure of the mental impressions, conclusions, opinions or legal theories of a party's attorney or other representative concerning the litigation.

The Courts have been consistent in saying that the disclosure of such information, if warranted at all, requires a higher standard of a highly persuasive showing or extraordinary justification to secure its release. See, for example, United States v. Petit -- P-e-t-i-t -- 438 F.3d 212, 215 (S.D.N.Y. 2020).

On the other hand, it appears to me that the defendant is entitled to a redacted version of the assertively privileged materials, which would show the headings, which would indicate the process that the Plaintiff went through in conducting its due diligence.

It's understood, I believe, that the plaintiff

intends to rely upon the privileged log in part for showing its compliance with the new clause in Section 547 pertaining to due diligence. And I believe it may well want to rely also as evidenced on the headings in those materials, which may mean for admissibility purposes to be admitted separately.

Obviously, the headings would not include -- and if for some reason they do, they should be redacted under Rule 26(b)(3)(B) in a opinion conclusion or legal theory, but simply show the process pursuant to which the analysis was done to serve the due diligence element.

The other basis for the motion is a waiver theory. There are, I believe three different theories of waiver that might be applicable here. But I conclude that none of them apply except arguably as to what I've required anyway under Rule 7026(b)(3)(A).

First, a waiver of the privilege, whether it's attorney/client or work/product is recognized where the party asserting the privilege has nevertheless used the privileged information in an offensive way.

The Courts frequently make the distinction between using the privilege only as the shield and not also as a sword. A subset of that waiver argument is the so-called selective use, where a part of the privileged material is used, but not all of it.

And a third is the so-called at issue doctrine, to the extent that it may apply in the federal case law as opposed to where it clearly applies to the New York State Case Law. Here, the substance of the due diligence materials is not being used offensively, nor is it at issue because the at issue rule generally applies to the substance of the (indiscernible) privileged matter being placed at issue.

But there is no issue of the substance, as I read Section 547, to the extent it requires reasonable due diligence. Again, that is a process point as opposed to an analysis of the substance of the due diligence, where it requires a process showing as opposed to a showing of the substance of the due diligence, the actual evaluation that was conducted, as a process matter needs to be shown, but not the outcome of that evaluation.

In that sense, it's also clear that the documents are not being used selectively. They're only being used to the extent they're relevant to the actual issue raised by 547(b)'s new language.

And finally, given that they're not being used offensively, it is part of the underlying issue. And it would therefore not be unfair to preclude the movant's access to the withheld information, since it truly is not an issue in this litigation and not being placed at issue.

See generally, in addition to the previous cases cited, NYU Winthrop Hospital v. Microbion Corp. 405 F3d 387 (E.D.N.Y. 2019). In re Residential Capital LLC, 536 B.R. at Pages 146 - 148. And Pereira -- P-e-r-e-i-r-a -- v. United Jersey Bank 1997 U.S. District Lexus 19751 (S.D.N.Y. December 11, 1997).

And except to the extent subsequently narrowed as to waiver by Pritchard v. County of Eerie 546 F.3d 222. Granite Partners, LP v. Bear Stearns & Co. 184 FRD 49, 55 (S.D.N.Y. 1999). I find the Granite Partners and Residential Capital cases particularly instructive here.

Both of them I think focus closely on what is in fact at issue in the litigation, and I believe lead to the conclusion that I've reached, which is that where the issue is a process issue as opposed to a legal conclusion underlying a defense, which is I believe the case here, as was also the case in ResCap.

The at issue waiver doesn't apply. So I will require the disclosure of the headings to the documents listed on the privileged log. It has been argued that the privileged log itself is enough and that the headings therefore don't need to be required.

But I believe it to be at least likely enough that the plaintiff will want to introduce the headings on the documents that -- into evidence that it should be provided

or they should be provided now to the movant. I stated during oral argument that I would like to confirm that the documents are what they say they are and the privileged log, given the limited number of those documents, I think that's warranted here, although it may be overkill.

And to minimize the burden, all that needs to be produced to me is the cover page of the respective documents and the portion that applies to the defendant here, WINNIADaewoo.

So I'm going to ask Mr. Clark, the movant's counsel, to prepare that order. You don't need to recite any of my rulings or the -- I mean, I'm sorry, the bench ruling behind it. You can simply refer to the bench ruling set forth on the record of the hearing and then state what I've -- that I've denied the motion except as set forth below. And then set forth where I have granted it or how I have granted it.

You don't need to formally settle that order on Mr. Banich, Mr. Clark, but you should run it by him before you email it to chambers, so he can make sure it's consistent with my ruling. And you should copy him obviously on the email to chambers.

MR. CLARK: Okay.

THE COURT: I think you --

MR. BANICH: Can I ask a clarification question?

THE COURT: Yes, go ahead, Mr. Banich.

MR. BANICH: Thank you. I'm sorry. Thank you. I understand your ruling regarding the redacting of production of the redacted documents that pertain to the spreadsheets. We did also withhold emails. And I don't hear your ruling to be pertaining to the emails that are withheld --

THE COURT: Well, those are attorney/client, so I don't --

MR. BANICH: Right.

THE COURT: -- think that's covered by Rule 7026. I'm just referring -- at this -- in this ruling, I'm referring only to the work product. If it's attorney/client, Rule 7026 doesn't apply and I've found that there's no waiver.

MR. BANICH: Okay.

THE COURT: So --

MR. BANICH: So just the spreadsheet --

THE COURT: Right.

MR. BANICH: Okay. That's fair. I understand.

THE COURT: Okay.

MR. CLARK: And so that's -- okay. And then, there was also the interrogatories?

THE COURT: Yes, that's -- that will be in the -- you put that in the order, too.

MR. CLARK: Okay, okay.

THE COURT: Yeah. Good -- as I -- you know, consistent with what I've said needs to be disclosed in the answers to those interrogatories.

MR. CLARK: Okay. All right, thank you, Your Honor.

THE COURT: Okay. Thank you both. All right. The last matter on the agenda, and I know Mr. Smith has been patiently waiting for this, is Item 4. It is James Smith's motion to extend the time to appeal the Court's order granting the Debtor's objection to his claim in this case, his proof of claim in this case. So I have --

MR. SMITH: Yeah --

THE COURT: I -- just so both of -- both sides know, I have reviewed the motion, and the Debtor's objection to it. So I have the benefit of that. And I'm happy to hear brief oral argument. But again, the oral argument needs to focus on the particular requirements to be shown for granting a motion to extend the time to appeal an order, which are set forth in Bankruptcy Rule 8002(d)(1).

So that's really what I'm focusing on here because that -- that's what governs the determination of this motion. I don't have to hear oral argument. The parties have laid out their positions and their pleadings, but I'm happy to hear brief oral argument. So Mr. Smith, you are -- you have the burden of proof here as to whether this

standard and Rule 8000(d)(2)(i) is satisfied, so you should go first.

MR. SMITH: Okay. I felt that the motion for me to be able to file as for an extension of time was literally apparent in Paragraph 4, Question 4 or Answer 4, where it says, “On the 25th, Mr. Smith failed (indiscernible) at the hearing.”

And nonetheless, the Court reviewed the consideration and considered to give the 23rd omnibus objection to the client because of the fact that he wasn’t there or wasn’t able to give an answer to any of their rebuttals or wanted (indiscernible) with answers for my paperwork.

So I think just based off of them just trying to move the case along without actually giving me a chance to participate based on early recess, I’m not sure what happened on that day. But it didn’t involve me not being able to appear because of COVID-19, basically was the cause to that.

THE COURT: Well, did you have COVID-19 or --?

MR. SMITH: No, but due to COVID-19 and coronavirus, there was no way for people to actually make it to New York. What do you mean, if I’ve been tested for it?

THE COURT: Well, it -- just that the Court was holding hearings. This hearing was held at that time on May

25 --

MR. SMITH: No, not at that --

THE COURT: -- by telephone.

MR. SMITH: Yes sir. No, it has -- somehow, it had replaced it in early recess, and then it went straight to -- from the 18th to the 25th, there was really -- to me, I don't know. I tried to log in and I was having the hardest time getting like logged in and I was just told that I would be able to -- since I missed it, I would be able to get the transcripts and also file an appeal. I couldn't read the document that I had sent, so I had to literally be patient and try to come up with the best solution to resubmit it.

THE COURT: Right. Well, why don't you tell me, what is it that you would have said or are saying?

MR. SMITH: Basically, I was going to say that based off of the information that I have supplied, the company basically has given me the -- I think it's called an -- I apologize. It's called an administrative claim. The only reason why I was unable to reflect off of a payment from Weil, Gotshal and Manges was because they keep questioning everyone's documents for legitimacy.

And I was told that they were just to pay out these documents. And as a senior director for Sears Roebuck & Company as a consultant, I do find it very odd that I did

turn in the same documents that sometimes they do ask for again, and try to think that they didn't receive them.

And that's why I had to make sure that the judge received a full set of what I have already sent. And I just followed it up with the Court to make sure that they had reflected on a way to follow.

THE COURT: Okay. Well, I have what -- I have all of the documents that have been filed --

MR. SMITH: Yes.

THE COURT: -- that were filed as part of your claim.

MR. SMITH: Yes sir.

THE COURT: And I had them back at the May hearing, too.

MR. SMITH: Right. So basically what I wanted to let them know was -- is I just wanted to let them know that Sears basically supplies these documents and I haven't been able to make any of my, you know, any money off of my participation and basically because they have held up my paycheck with type of situations like these.

And I just don't understand why Sears keeps vouching for my employment and there's always some type of delay. I'm not sure and I don't know why they didn't call the law firm that literally states that they would verify over a billion dollars, but up to a billion dollars if

necessary in verified funds for the overall inclusion into the committees that literally sees over those debts so they could be able to cross verify the information. And I thought I saw the same information for (indiscernible).

THE COURT: Okay.

MR. SMITH: As far as the statement.

THE COURT: All right. Okay, thank you.

MR. LITZ: Good afternoon, Your Honor. Dominic Litz, Weil, Gotshal & Manges on behalf of the Debtors. Can you hear me all right?

THE COURT: Yes.

MR. LITZ: Thank you, Your Honor. Your Honor, you noted at the outset this is a hearing on Mr. Smith's motion to extend time to file a notice of appeal. I'm happy to respond to Mr. Smith's allegations about the May 25th hearing, where I feel like our position was (indiscernible) out our papers in the objection, and our response to Mr. Smith reply and the record that was set forth at the May 25th hearing.

However, going back to what Mr. Smith said, excuse me, about the Debtor's objection to this motion, I would just like to re-read Paragraph 4 to correct the record where it notes on May 25th, 2021, Mr. Smith failed to appear at the hearing. Nonetheless, the Court reviewed and considered Mr. Smith's response.

And at the hearing, the Court sustained the 23rd omnibus objection and disallowed and expunged the claims in full. The Court ruled on the substance of the claims or lack thereof and did not rule against Mr. Smith based on his failure to appear at the hearing.

The Court found that the claims lacked merit and Mr. Smith's claims (indiscernible) response lacked credibility. Your Honor, I don't think there's much more that I need to go into on the merits of the claims.

With regards to Mr. Smith's motion that's before the Court today, the Debtor's position is that he has failed to prove excusable neglect, which is required by Bankruptcy Rule 8002(d)(1)(b) to have the Court grant an extension of time to file a notice of appeal. I'm happy to answer any questions Your Honor has.

THE COURT: Okay. All right, thank you. All right. I'm going to give you my ruling on this motion now. I have before me a motion by Mr. Smith for an extension of his time to appeal my order that disallowed his proof of claim filed in this case. The timing here is important. I signed that order on June 7, 2021.

That followed a hearing on the Debtor's claim objection, which took place on May 25, 2021. The normal time to file an appeal under Bankruptcy Rule 8002 is 14 days after the date of the order, which would've been June 21,

2022. However, Bankruptcy Rule 8002 provides an -- in Paragraph D, for an extension of the time to appeal.

It states as except as provided in Subsection (d)(2), which is not relevant here, the Bankruptcy Court may extend the time to file a motion -- I'm sorry -- to file a notice of appeal upon a party's motion that is filed (b) within 21 days after the time prescribed by this rule, i.e., 21 days after the 14 days provided for an appeal.

And then, the rule goes on to say, "If the party shows excusable neglect." Here, the motion was filed on the 21st day after the 14 days for an appeal as of right under Rule 8002(a)(1), which is technically within the deadline set forth in Rule 8002(d)(1).

The rule, as I quoted it, permits the motion to be granted only if, again, the movant, Mr. Smith, shows excusable neglect for his not having previously timely filed his appeal. The Bankruptcy Court is the court to decide this issue as opposed to the District Court, where the appeal might be filed, see Joslin V. Wechsler -- W-e-c-h-s-l-e-r -- (In re Wechsler) 246 B.R. 490, 492 (S.D.N.Y. 2000). And In re Enron Corp. 364 B.R. 482, 486 (S.D.N.Y. 2007). Both of which cases also note that the rule requires a showing of excusable neglect.

The Supreme Court addressed the meaning of excusable neglect in Pioneer Investment Services Company v.

Brunswick Associates, LP, 507 U.S. 380 at 387 through 88 and then at 395 1993. First, the movant must show that its failure or his failure in this case to file timely constituted neglect as opposed to willfulness or knowing a mission.

Neglect generally would be attributed to a movant's inadvertence, mistake or carelessness. I don't believe here that Mr. Smith's failure to file his appeal within the 14 days prescribed by Rule 8000 (2)(a)(i) was a matter of a conscious choice or knowing act, but rather was due to inadvertence or carelessness. But that's just the first prong of the standard.

After establishing neglect as opposed to willfulness or knowledge of the bar date or the deadline and the failure to show any unknowing basis for neglecting it, the movant must show by a preponderance of the evidence that the neglect was "excusable". That analysis is to be undertaken on a case by case basis, that is based on the particular facts of the case.

Although the Court is guided by and makes the determination balancing the following factors: A, the danger of prejudice to the Debtor; B, the length of the delay and whether or not it would impact the case; C, the reason for the delay; and in particular, whether the delay was within the control of the movant; and D, whether the movant acted

in good faith in a 395.

However, inadvertence, ignorance of the rules or mistakes construing the rules do not usually constitute excusable neglect, Midland Cogeneration Venture LP v. Enron Corp (In re Enron Corp), 419 F3d 115, 126, 2nd Cir. 2005. In that case, the Second Circuit held, “We have taken a hard line in applying the pioneer test. In a typical case, three of the pioneer factors -- the length of the delay, the danger of prejudice and the movant’s good faith usually weigh in favor of the parties seeking the extension.”

We have noted, though, that we and other circuits have focused on the third factor, the reason for the delay, including whether it was within the reasonable control of the movant. And we’ve cautioned that the equities will rarely if ever favor a party who fails to follow the clear dictates of the Court rule.

And that where the rule is entirely clear, we continue to expect that a party claiming excusable neglect, will, in the ordinary course lose under the pioneer test. And that’s not -- and thus, not get the extension. The Courts have made it clear that the foregoing law applies to pro se litigants like Mr. Smith as well as to those who have lawyers, as stated in In re Enron Corp. 364 B.R. at 488, simply to inspire a pro se litigant of the applicability of an expressly stated time limitation does not constitute

excusable neglect.

Citing Riedel -- R-i-d -- R-i-e-d-e-l v. (indiscernible) Midland Bank 1997 U.S. District Lexus 4551 at Page 2 (N.D.N.Y April 10, 1997). Here, I've reviewed carefully Mr. Smith's motion and it does not set forth a basis that would establish excusable neglect.

He has stated that he wants more time to obtain counsel to help him on an appeal or to help him to understand his position and to look into the cases before choosing whether to dismiss them or not. Under the foregoing case law, that does not constitute a reasonable excuse for the delay here and would require the denial of the motion.

In addition, while I believe clearly that Mr. Smith has acted in good faith, the length of the delay here and the danger of prejudice to the Debtor are both also points that argue in favor of denying the motion.

That's not because simply the fact that the Debtor would have to deal with an appeal, but rather, given the nature of the claim, which is of enormous size, over a billion dollars, and what I believe to be the very clearly lacking nature of the proof for the claim.

I understand and regret that Mr. Smith did not attend the May 25 hearing. People always want to be heard, and I have heard Mr. Smith today on the merits of his claim.

But it is clear to me, based on my recollection of the hearing, as well as my review of the transcript of that hearing, that particularly pages 17 through 19 of that transcript, that I did not rule on the basis of his nonappearance.

I did not treat this as a default judgment. In other words, rather, I based my ruling on my review of the claim objection, which I believe clearly shifted the burden to the extent the claim was a general unsecured claim, onto Mr. Smith. And that was a burden that he held, in any event, with regard to the claims assertion that it was secured or administrative.

And the documents attached to the claim and the claim itself simply do not carry that burden. And his reference to them today and discussion of them similarly does not carry that burden. Again, I've reviewed those documents. I reviewed them before the May 25th hearing, and I concluded then that they don't state a claim.

So therefore, it would in fact be prejudicial to the Debtor to have to pursue an appeal after the deadline in light of the merits here, as well as the impact of having such a large and I believe not meritorious claim hanging over the case.

Those are separate reasons for denying the motion, given the Enron cases, however, they're not necessary, since

I've concluded that the reason for the delay was within the control of Mr. Smith. So I will ask the Debtor's counsel to submit an order denying the motion for the reasons stated in the Court's benchroom.

MR. LITZ: (indiscernible), we will do so.

THE COURT: Okay.

MR. SMITH: But I do have a question in regards to your (indiscernible) to grant the extension of time. Adobe scans did not -- literally has a back color drop that (indiscernible) your Court is not able to understand it. And it was literally on a weekday.

So the inclusion of the 24-hour military time for me to resubmit the documents based on the fact that I had to literally have someone else do it for me, I did not include that, like the burden of how long it took me to get it done. But it was not very many days after, because I wasn't able -- communicating with your --

THE COURT: Okay. Well, again, I -- the bankruptcy rules lay out a maximum of 34 days. And you are within that 34 days, but --

MR. SMITH: Right.

THE COURT: For the last 21, to have the motion granted, you have to show excusable neglect for not having met the 14. And I -- I'm not able to find that today. So --

MR. SMITH: Great. That (indiscernible) came from the application being faulted because I had the same application error with -- Carvano was also not able to reflect or understand the documents as well. So I can literally use the Adobe scan application as a cause for documents that can be sent as a PDF through the internet as an email will not come out readable. And that literally just gave me the reason not to be able to file an extension.

They just wanted me to re-submit the documents. I do have the documents submitted on time, if you really do want to take a closer look. The documents do reflect on time implementations, but your clerk would not submit them to you for me to get a closer court date until I resubmitted them twice. So they were clearly readable.

THE COURT: No, but Mr. Smith, the -- it's not the -- it's the motion itself for an extension of time --

MR. SMITH: Okay.

THE COURT: -- that needs to be filed and the appeal itself, which doesn't require a record. You just filed a notice of appeal, which is a one-page notice. So --

MR. SMITH: Right.

THE COURT: -- again, I've given you my ruling, and I'm not going to alter it at this point.

MR. SMITH: Okay. So what was your ruling to not -- so what about the --

THE COURT: I denied the motion. I denied the motion based on the record of today's hearing.

MR. SMITH: Okay. So are you -- so what does that mean for me to be able to -- do I have to appeal your decision as well today?

THE COURT: Well, my decision is my decision. And I don't -- I'm not going to give you legal advice as to whether you should appeal or whether you have a right to appeal, but that -- I did lay out my decision today and there'll be an order that memorializes it, that will get added probably later this week.

And you should keep a look out for that. It'll be mailed to you. It'll be also on ECF, and that will -- if you do have a right to appeal, start your time to appeal that decision. Not the underlying order.

MR. SMITH: Okay, so what --

THE COURT: (indiscernible) the claim objection, I mean.

MR. SMITH: I am sorry. Can you say that one more time?

THE COURT: What you will be getting is an order denying your motion for an extension of the time to appeal.

MR. SMITH: Okay.

THE COURT: And --

MR. SMITH: All right.

THE COURT: Obviously there is a -- if there is a right to appeal that, there is a time limit to do that. But the appeal --

MR. SMITH: Right.

THE COURT: -- would be only from that order. There's not a right to appeal from the order granting the claim objection. That time has passed.

MR. SMITH: No, the -- sorry, go ahead.

THE COURT: So anyway, I'm going to conclude the hearing at this point. And I'll look for that order.

MR. SMITH: Okay, sir. I do have a question.

THE COURT: Okay.

MR. SMITH: I need to make sure that -- so I do have another court date, and it was -- and do I have to -- I am not a lawyer, I don't have --

THE COURT: No, Mr. Smith, you don't have another court date. What you might be able to do, and I'm not going to give you legal advice, but you might be able to appeal the order that will get entered on denying the motion that we've just been covering.

And but that would be just a notice of appeal that you would file. You don't need a hearing in front of me for that, if you file that notice timely, i.e., within 14 days of the entry of the order.

MR. SMITH: If I find the application for me to

(indiscernible), then -- the submission number for the day that I turned in the actual paperwork, would you accept that as an on-time filing, because it was filed on time, but (indiscernible) --

THE COURT: No. No, I'm just dealing with the motion that was filed on the record for that. So I'm going to have to conclude this hearing, Mr. Smith. And again, I'll look for the order from the Debtor's Counsel.

MR. SMITH: Okay, yeah. Have a great day.

THE COURT: Okay, thank you. And I think that does it for (indiscernible) hearing for today, correct?

MAN: Thank you, Your Honor.

THE COURT: On Sears, the omnibus hearing?

MAN: That's correct.

THE COURT: Great. Thank you.

MR. SMITH: Do I have another (indiscernible)? I have another (indiscernible)?

(Whereupon these proceedings were concluded at 1:22 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Digitally signed by Sonya Ledanski Hyde
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